

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

PENCADER REALTY LLC,

Plaintiffs

v.

SRI GANESH SAI LLC,

Defendant.

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C.A. No: CPU4-18-002182

Reserved: September 9, 2019

Decided: October 15, 2019

Adam F. Wasserman, Esquire
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OPINION ON DEFENDANT'S MOTION TO REARGUE

WELCH, J.

On August 9, 2019, this Court held a hearing on Peter Meyer's Motion to Vacate and Pencader Realty LLC's response thereto. This Court Denied Peter Meyers Motion to Vacate on the record and filed an Order denying the motion on August 19, 2019. On August 14, 2019, Peter Meyer timely noticed the present Motion for Reargument (the "Motion") pursuant to Court of Common Pleas Rule 59(e). On August 28, 2019, Pencader Realty LLC filed a response in opposition to the Motion. On September 6, 2019, Peter Meyer filed his Reply. This is the Final Decision and Order on Peter Meyer's Motion for Reargument.

FACTUAL AND PROCEDURAL HISTORY

On May 2, 2018, Pencader Realty LLC ("Plaintiff") filed this action against Sri Ganesh Sai LLC ("Defendant") for breach of contract arising from a real estate transaction. Plaintiff entered into an agreement to purchase property from Defendant located at 1 6th Street, New Castle, DE 19720 (the "Property"). Meyer & Meyer Realty ("M&M") was the real estate agent for both Plaintiff and Defendant. The agreement between the parties was contingent on Plaintiff successfully obtaining a mortgage to finance the purchase of the Property. In the interim, the Property was in need of a new roof. Plaintiff asserts M&M urged Plaintiff to repair the roof and the parties agreed that should the transaction fall through, Plaintiff would be reimbursed for the cost. On June 9, 2017 and June 16, 2017, Plaintiff wrote a check to M&M for the replacement of the roof in the amount of \$5,635.00 each for a total of 11,270.00. Plaintiff claims its bank denied the requisite financing for the purchase of the Property and M&M instructed Plaintiff to withdraw from the purchase. Despite Plaintiff's withdrawal from the sale, Defendant has not returned the cost of repairing the roof to Plaintiff.

On June 27, 2018, Plaintiff filed an affidavit for entry of default judgment for want of an answer by Defendant and this Court entered default judgment. On July 17, 2018, Charles S. Knothe, Esquire (“Knothe”) entered his appearance on behalf of the Defendant.

On July 17, 2018, Defendant filed a Motion to Vacate the default judgement and on July 24, 2018, Plaintiff responded in opposition to Defendant’s Motion to Vacate. On July 31, 2018, this Court granted Defendant’s Motion to Vacate and ordered Defendant to file an answer within fifteen (15) days. On August 13, 2018, Defendant filed an answer denying Plaintiff’s substantive allegations and counterclaimed for attorney’s fees in the event Defendant prevailed.

On January 15, 2019, Defendant filed a Motion for Summary Judgement asserting a statute of frauds argument. On January 23, 2019, Plaintiff responded to Defendant’s Motion for Summary Judgment arguing the statute of frauds partial performance exception. On January 25, 2019, this Court denied Defendant’s motion.

On January 28, 2019, Knothe filed a Motion to Withdraw as counsel for Defendant because Defendant failed to respond to counsel. On February 8, 2019, this Court granted Knothe’s request and instructed Defendant to hire counsel within thirty (30) days or face default judgment.

On March 11, 2019, Plaintiff filed a Motion for Default Judgment and on March 22, 2019, this court entered default judgement in favor of the Plaintiff against the Defendant.

On June 26, 2019, Plaintiff filed a Motion for Attachment of Judgment Lien and Writ of Execution, requesting to attach judgment to a third party, Peter Meyer (“Meyer”). On October 19, 2018, while litigation was pending, Meyer purchased the Property in question from the Defendant. Plaintiff alleged Meyer purchased the Property despite knowing of the litigation. Plaintiff further argued the principal of the Defendant absconded following the sale of the Property. On July 26,

2019, this Court granted Plaintiff's motion in part, permitting Plaintiff to pursue its judgment by way of writ of execution upon the Property, notwithstanding the transfer of ownership of the Property.

On July 26, 2019, Knothe, despite his failure to file an entry of appearance, filed a Motion to Vacate the default judgement as Meyer's counsel. Meyer asserted his counsel prepared a response to Plaintiff's motion to attach; however, due to a clerical error, the response to Plaintiff's motion was not docketed. Meyer requested the decision be vacated and he be permitted to file a response to Plaintiff's motion for attachment. On August 5, 2019, Plaintiff filed a response in opposition to Meyer's motion to vacate. Plaintiff argued Meyer's Motion to Vacate failed to demonstrate excusable neglect for failure to timely respond and attend the hearing on Plaintiff's motion. Plaintiff asserted Meyer could not avoid the rule of the Court by simply alleging clerical errors. Plaintiff contended that permitting counsel to avoid following procedural rules for a second time in the case would rendered the rule meaningless. On August 9, 2019, this Court found that Meyer did not meet the required essential elements of a Motion to Vacate and thus, denied Meyer's motion. On August 14, 2019, Meyer filed the instant Motion for Reargument.

PARTIES CONTENTIONS

In Meyer's Motion for Reargument, counsel for Meyer reiterates that he prepared a response to Plaintiff's motion to attach judgment, but due to a clerical error the matter was not filed. Meyer's counsel asserts that the failure to respond to Plaintiff's motion and appear for the hearing was not due to a lack of care or disregard. More specifically, Meyer avers that his office consists of himself and three (3) paralegals, two of which are his family members who were unable to work due to personal health issues. Further, Meyer's counsel argues he had to reduce his workload to care for his family. In addition, Meyer's counsel avers his failure to meet a filing

deadline in this case was due to a defective router that affected his office internet service for weeks and thus, he could not communicate with clients or the courts.

Secondarily, Meyer asserts a meritorious defense to Plaintiff's Motion for Attachment of Judgement Lien and Writ of Execution. In contention to Plaintiff's claim that Meyer's purchase of the Property from Defendant violated 6 *Del. C.* Chapter 13, Meyer argues he was not an insider of Defendant's entity as defined by the statute, the transfer of the Property was not concealed and the principal of Defendant did not abscond. Additionally, Meyer argues he purchased the Property at fair market value under the belief that what he was doing was right, honest and legal and thus, is a protected transferee pursuant to 6 *Del. C.* 1308.

Finally, Plaintiff contends the Motion to Vacate requires no excessive prejudice to Plaintiff. Meyer avers a long period of time did not lapse between the Court's decision and the Motion to Vacate; thus, Plaintiff has not received any benefit from the Court's decision.

Plaintiff asserts Meyer's Motion for Reargument fails to provide a valid legal basis for granting reargument. Plaintiff states Meyer's Motion advances new arguments as to why his counsel failed to file a response to Plaintiff's motion and appear at the hearing on Plaintiff's motion. Further, Plaintiff asserts these arguments could have been raised in Meyer's initial Motion to Vacate or at the hearing on the Motion to Vacate. Moreover, Plaintiff contends that if this Court were to consider the merits of Meyer's Motion to Reargue, he should not prevail. Plaintiff avers that Mr. Meyer's counsel's circumstances do not establish excusable neglect. Specifically, Plaintiff claims no facts asserted by Meyer indicate counsel for Meyer attempted to file an entry of appearance in this matter, file a response to Plaintiff's motion for attachment or calendar the motion hearing. Furthermore, Plaintiff alleges that Meyer cannot show a meritorious defense. In contention to Meyer's assertion that his purchase of the Property from Defendant did not violate 6

Del. C. Chapter 13, Plaintiff argues Meyer was an insider, the transfer of the Property was concealed, Defendant had been sued before the transfer of the Property was made, the transfer of the Property was of all Defendant's assets, Defendant absconded and Defendant became insolvent after the transfer was made. Moreover, Plaintiff states Meyer did not obtain the Property in good faith. In closing, Plaintiff avers it would suffer prejudice if the Court were to grant Meyer's Motion for Reargument, because Plaintiff has spent substantial time and incurred expenses in attending court proceedings, drafting briefs surrounding this issue, and obtaining this Court's permission to levy execution on the Property and filing an Attachment Eieri Facias against the Property.

STANDARD OF REVIEW

Pursuant to Court of Common Pleas Civil Rule 59(e), "[a] motion for reargument is the proper device for seeking reconsideration by the Trial Court of its findings of fact, conclusions of law or judgment."¹ A motion for reargument, however, does not entitle the moving party to merely reiterate arguments that were previously presented to the Court, nor does it provide the moving party with an opportunity to present new arguments not raised in the original proceeding.² The Court will deny the motion to reargue unless the moving party shows that the Court either has overlooked a controlling precedent or legal principle, or has misapprehended the law or facts in a manner that would change the outcome of its decision had it been correctly or fully informed.³ A party seeking reargument "must demonstrate newly discovered evidence, a change in the law, or manifest injustice."⁴

DISCUSSION

In Meyer's Motion, he advances numerous reasons why he should be entitled to reargument. However, Meyer asserts arguments previously presented, considered and rejected by this Court. Meyer raises for the first time specifics regarding his counsel's failure to respond to

Plaintiff's motion and attend the hearing on Plaintiff's motion. However, these assertions were not raised in the previous motion or motion hearing and cannot be considered at this time. Thus, the Court has reviewed the Motion and finds it has not overlooked any controlling precedent or legal principle, nor has it misapprehended the law or facts in a manner that would change the outcome of its Order on Meyer's Motion to Vacate. However, in the interest of justice, the Court will revisit and redetermine the Motion to Vacate.

Under CCP Rule 60(b), a party moving to vacate a default judgment must satisfy the following three elements: "(1) excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on the merits; and (3) a showing that substantial prejudice will not be suffered by the plaintiff if the motion is granted."¹ Excusable neglect is defined as "that neglect which might have been the act of a reasonably prudent person under the circumstances."²

Excusable neglect has been found where the review of the facts and circumstances indicate the party seeking relief made active efforts to comply with the rules of the court.³ However, excusable neglect is not found where a review of the facts and circumstance indicate the affected party did not make a reasonable effort to comply with the rules.⁴ Here, Meyer's counsel argues his conduct was that of a reasonable prudent person and is excusable under Court of Common Pleas Rule 60(b). On July 1, 2019, notice of the July 26, 2019 hearing on Plaintiff's Motion for Attachment of Judgement Lien and Writ of Execution was served to Meyer. Nevertheless, Mr. Meyer's counsel asserts he was not aware of the hearing as a result of a clerical error. However,

¹ *Credit Acceptance Corp. v. Barkley*, 2010 WL 2346220, at *1 (Del. Com. Pl. May 4, 2010).

² *Id.*

³ *Young Conway Stargatt & Taylor, LLP v. Asthma Disease Management Inc., et al.*, 2005 WL 8150143, at *2 (Del. Com. Pl. Mar. 24, 2005) citing to *Wilson v. King*, 1998 WL 110117 (Del. Super.).

⁴ *Id.*

counsel's arguments do not constitute excusable neglect because Meyer was served with notice of the hearing. Counsel for Mr. Meyer avers he prepared a response, but fails to demonstrate that he made any attempt to file said response. Further, a reasonable prudent person in preparing a response and representing clients through the litigation process would take steps to determine the status of his or her pending cases. Notably, this is the second time in this case that counsel for Mr. Meyer neglected to appear for a hearing and filed a Motion to Vacate. This Court granted counsel's previous Motion to Vacate on July 27, 2018. A reasonable attorney would institute procedural safeguards to prevent any further oversight in court deadlines and scheduled hearings. Thus, counsel's second failure to appear for a scheduled hearing in this Court can no longer be considered excusable.

In addition, Meyer could not provide a defense that would result in a different outcome if the matter was heard on the merits. Under the Delaware Uniform Fraudulent Transfer Act ("DUFTA"), a transfer made by a debtor is fraudulent as to a creditor where the debtor made the transfer "[w]ith the actual intent to hinder, delay or defraud any creditor of the debtor..."⁵ Under the statute, a "creditor" is defined as "a person who has a claim."⁶ A "claim" is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmature, disputed, undisputed, legal, equitable, secured or unsecured."⁷ Pursuant to the statute, "[a] transfer made or obligation occurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation...with actual intent to hinder, delay or defraud any creditor of the debtor."⁸ The statute provides a list of non-exclusive factors

⁵ 6 Del. C. § 1304(a).

⁶ *Id.*

⁷ *Id.* at § 1301(3).

⁸ *Id.* at § 1304(a)(1).

to consider in determining actual intent underlining a fraudulent transfer.⁹ The factors this Court will consider are whether: (1) [t]he transfer...was to an insider; (3) [t]he transfer...was disclosed or concealed; (4) [b]efore the transfer was made...the debtor had been sued or threatened with suit; (5) [t]he transfer was of substantially all the debtor's assets; (6) [t]he debtor absconded; [and] (9) [t]he debtor was insolvent or became insolvent shortly after the transfer was made.¹⁰

Here, the Court agrees with Plaintiff's argument that multiple factors listed under Section 1304(b) support a finding that Defendant and Meyer had an actual intent to defraud Plaintiff. First, Meyer was the real estate agent for Plaintiff and Defendant. In addition, Meyer and his company, M&M, managed the Property. Notably, the checks totaling \$11,270 to repair the roof was made out to M&M. Further, Meyer was aware of the litigation between Plaintiff and Defendant at the time the Property was transferred. Moreover, the facts indicate that Meyer was involved, to some extent, in the dispute between Plaintiff and Defendant regarding the roof replacement and the alleged agreement that Plaintiff would get his money back if the sale fell through. An "insider" is generally defined as "the parties set forth on the list or someone that has a close enough relationship to the party which warrant closer scrutiny by the Court..." "[T]he term also encompasses anyone with sufficiently close relationship with the debtor that his conduct is made subject to scrutiny more than those dealing at arm's length with the debtor."¹¹ Thus, the facts support the conclusion that Meyer was an insider. Second, the transfer of the Property to Meyer was not disclosed to Plaintiff despite Plaintiff's suit against Defendant. Second, Defendant neglected to relist the Property after it had been taken off the market and Meyer purchased it. This directs the Courts attention to another factor, which is the transfer of the Property to Meyer after Plaintiff brought

⁹ See *id.* at § 1304(b).

¹⁰ *Id.*

¹¹ *News Journal Co. v. Little Caesars of Delaware, Inc.*, 2000 WL 33653432, at *2 (Del. Com. Pl. Oct. 20 2000).

suit against Defendant. Next, Plaintiff argues and Meyer admits that the transfer of the Property was all of Defendant's assets. Additionally, Defendant failed to respond to its counsel, resulting in counsel withdrawing its representation. Following the withdrawal of counsel, Defendant disregarded Plaintiff's filings, which results in a default judgment in Plaintiff's favor. Thus, the record signifies Defendant absconded. Finally, Plaintiff claims and Meyer concedes that Defendant became insolvent after the transfer of the Property was made. These facts before me indicate that Defendant and Meyer acted with actual intent to hinder, delay and defraud Plaintiff. In his defense, Meyer asserts he obtained the Property in good faith. However, despite paying a reasonable value for the Property, Meyer asserts no facts to support the claim that he obtained the Property in good faith and under the belief that doing so was right, honest and legal. Therefore, I cannot find Meyer could provide a meritorious defense that would result in a different outcome if this issue was heard on the merits.

Lastly, Meyer has failed to show that substantial prejudice will not be suffered by the Plaintiff if the Court grants his motion. The Plaintiff has spent time and expense in drafting arguments, responses and attending court proceedings on the issues surrounding Meyer's failure to take action in this case. This is the second Motion to Vacate Default Judgement Meyer has filed with this Court. Furthermore, Plaintiff spent time and expense in obtaining the Court's permission to levy execution on the Property and filing an Attachment Fieri Facias against the subject Property.

This Court is fully aware of Delaware Supreme Court precedent favoring adjudication of cases on the merits.¹² However, this case does not fit within the purview of a Motion to Vacate.

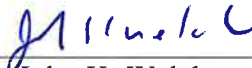
¹² *Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1135 (1977).

As noted above, this was the second time that Defendant's counsel filed a Motion to Vacate in this case. This Court exercised its discretion the first time; however, this time, both counsel and Meyer were unable to satisfy the elements of such a motion.

CONCLUSION

For the foregoing reasons, the Court finds no basis to alter or modify its Order. Thus, Meyer's Motion to Reargue is DENIED. Each party shall bear their own costs.

IT IS SO ORDERED.



John K. Welch,
Judge

cc: Ms. Patricia Thomas, Civil Clerk